

***United States Court of Appeals
for the Second Circuit***



**APPELLANT'S
BRIEF**

ORIGINAL

77-2053

To be argued by

HENRY J. STEINGLASS

United States Court of Appeals

For the Second Circuit

JOHN SUGGS,

Petitioner-Appellee,

against

J. EDWIN LAVALLEE,

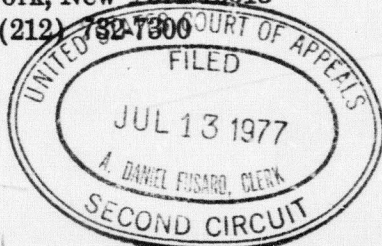
Respondent-Appellant.

**On Appeal from the United States District Court
for the Southern District of New York**

BRIEF FOR RESPONDENT-APPELLANT

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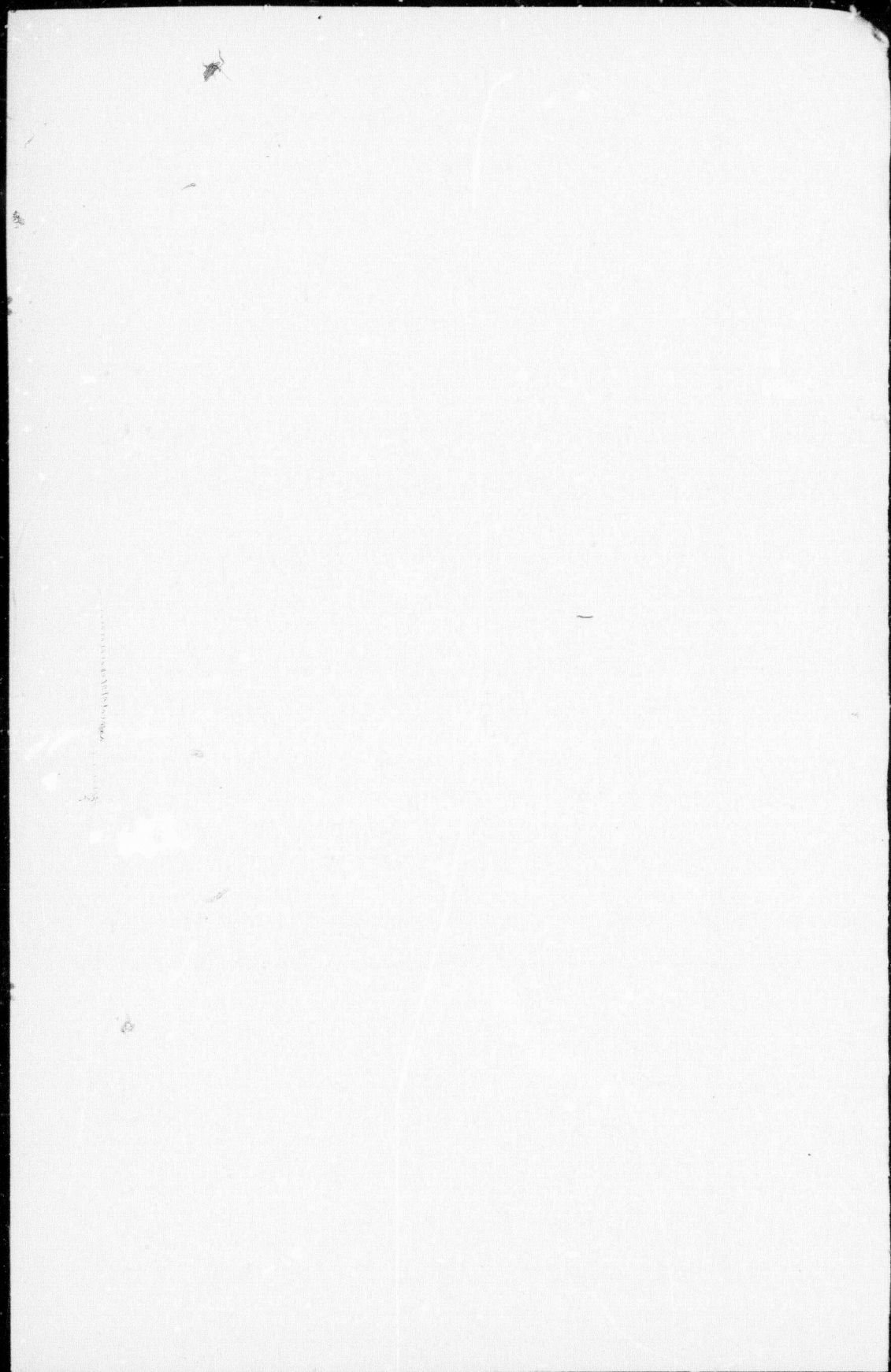


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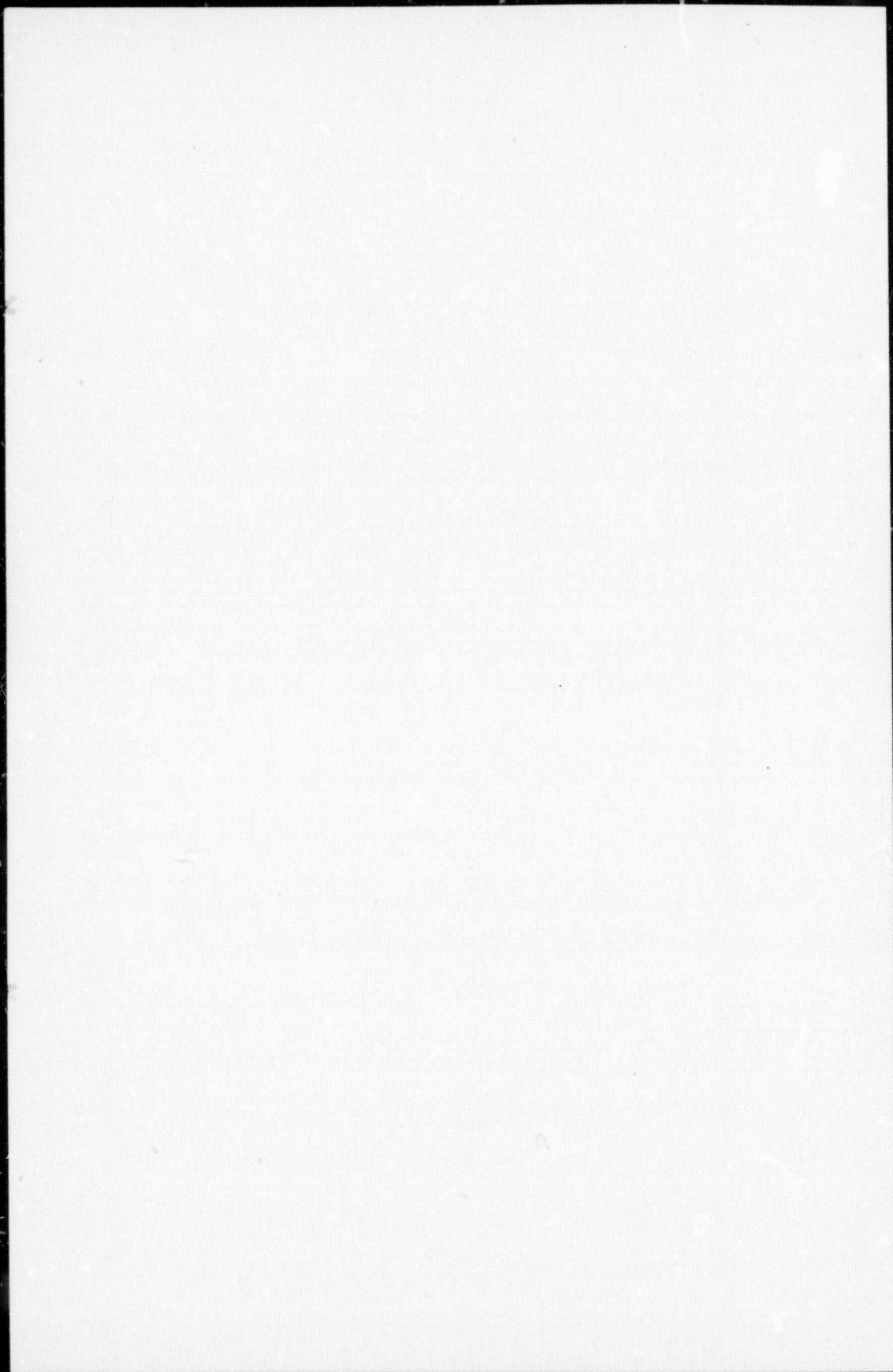
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United States Court of Appeals

For the Second Circuit

Docket No. 77-2053

JOHN SUGGS,

Petitioner-Appellee,

against

J. EDWIN LAVALLEE,

Respondent-Appellant.

On Appeal from the United States District Court
for the Southern District of New York

BRIEF FOR RESPONDENT-APPELLANT

Question Presented

1. In a habeas proceeding by a state prisoner who claims that he was incompetent when he pleaded guilty, may a federal district court decide to ignore a state court's determination, made after a full evidentiary hearing and supported by the record, that the prisoner was competent when he pleaded guilty?

2. May a state prisoner obtain federal habeas relief on the ground that he was incompetent at the time he pleaded

guilty, when he personally assured the state court prior to sentencing that he had abandoned that claim and had decided not to withdraw his guilty plea?

Statement of the Case

Preliminary Statement

The State of New York appeals from an order, entered April 6, 1977, in the Southern District of New York (DUFFY, J.), granting a petition for a writ of habeas corpus by petitioner-appellee John Suggs, a state prisoner. Suggs pleaded guilty to RAPE IN THE FIRST DEGREE and ROBBERY IN THE FIRST DEGREE in New York State Supreme Court on September 13, 1968. He was sentenced on June 6, 1969, to five to fifteen years' imprisonment, which he is presently serving.* The order appealed from vacated Suggs' conviction on the grounds that he was incompetent when he pleaded guilty, and directed that the writ issue in sixty days unless Suggs is permitted to replead in state court within that time. A stay was granted pending this appeal.

On the State's prior appeal from a previous grant of the writ by the District Court, 390 F. Supp. 383 (1975), this Court reversed and remanded for an evidentiary hearing on the issue of Suggs' competency at the time he pleaded guilty, the hearing to be held in the state or federal court as the District Court should determine. 523 F. 2d 539 (1975). The District Court decided that the hearing should be held in the state court. 400 F. Supp. 1366 (1975).

* J. Edwin LaVallee was named as respondent herein, but he no longer has custody of Suggs, who is presently confined at Eastern Correctional Facility (Napanoch). Respondent-appellant is referred to herein as "the State."

The state Supreme Court (MELIA, J.) held an evidentiary hearing and determined that Suggs was competent when he pleaded guilty. The District Court then decided to treat the state court's decision as a nullity and ordered a federal hearing. 422 F. Supp. 1042 (1976). At that hearing, the record of the state court hearing was introduced and constituted the bulk of the evidence. The District Court decided that Suggs was incompetent when he pleaded guilty, and again granted the writ, which is the subject of this appeal.

The Charges

Suggs was charged with rape, sodomy and robbery of three women. Indictment No. 3063-68. In another indictment, he was charged with robbing two women. Indictment No. 3063A-68. These crimes were committed in April and May 1968.* Suggs was also charged with assaulting a police officer on May 6, 1968. Indictment No. 2251 (charging assault as a felony and as a misdemeanor).

* There were a total of 23 counts, as follows:

Indictment No. 3063-68—

Doris Mohit: rape, sodomy, robbery and related crimes committed on May 24, 1968 (counts 1-6)

Majorie Levenson: rape, sodomy, robbery and related crimes committed on April 27, 1968 (counts 7-12)

Julie Rosen: rape, sodomy, robbery and related crimes committed on May 22, 1968 (counts 13-18).

Indictment No. 3063A-68—

Eleanor Evans: robbery and related crimes committed on April 30, 1968 (counts 1-3)

Sylvia Barbero: robbery and a related crime committed on May 28, 1968 (counts 4-5)

Copies of these indictments, which were filed July 30, 1968, are annexed as Exhibits A and B to petitioner's papers filed in the District Court in support of his "Motion to Remove Action from Suspense Calendar," etc., dated April 19, 1974 (Document Number 33 in the Record on Appeal).

The Psychiatric Examination by Dr. Messenger

In July 1968, Suggs was examined in the state Supreme Court psychiatric clinic. Dr. Emanuel Messenger, the psychiatrist in charge of the clinic, found Suggs to be competent to stand trial. Suggs was "without psychosis and of average intelligence." Dr. Messenger diagnosed Suggs as a "sociopathic personality," a type of personality disorder. Suggs was in contact with reality, and he could cooperate with counsel and participate in his defense (Messenger: St.Tr. 103, 106-108; Mr. Messenger's report of July 23, 1968 (Peo. Exh. 1, p. 1).*

On August 1, 1968, Suggs pleaded not guilty to the charges pending against him.

* This examination was done as part of a routine pre-pleading investigation of defendants who, like Suggs, then 17 years old, were eligible for youthful offender treatment (Messenger: St.Tr. 117-118). Suggs was subsequently denied youthful offender treatment by Justice Tierney on July 31, 1968.

References indicated by "St.Tr." are to the transcript of the hearing held in the state court on November 17 and December 1, 1975, which was marked as Court Exhibit Z in the hearing held by the District Court in January 1977. The State's exhibits, which were numbered identically 1-5 at the state and federal hearings are referred to herein as "Peo. Exh. —." A legible re-typed copy of Dr. Messenger's report of July 23, 1968 is included as Exhibit 1A.

In the normal course, Dr. Messenger's report on his examination of Suggs would have been transmitted to the court file (Messenger: St.Tr. 116). However, the court's copy of the report apparently went astray. The report was not in the court file at the time of the plea. Its existence did not become known until April 1, 1975, when it was discovered by an Assistant Attorney General while the prior appeal to this Court from the District Court's initial issuance of the writ was pending. (See stipulations re testimony of Justices Nunez and Sandifer (Suggs' Exhs. A and B), and of Assistant Attorney General Spiegel (St.Tr. 190-192). See also Plea Mins. 20a-21a (references indicated by "—a" are to pages of the Joint Appendix on this appeal).

The Plea of Guilty, September 13, 1968

On September 13, 1968, Suggs appeared in state Supreme Court before Justice Emilio Nunez. Suggs was represented by Donald Tucker, an attorney then on the staff of the Legal Aid Society.

Suggs conferred with Mr. Tucker, relating the facts concerning his cases. Suggs admitted that he was guilty of all the charges pending against him. Mr. Tucker informed Suggs that the prosecution would accept a guilty plea to the "top count" of each of the two principal indictments, i.e. to the rape of Doris Mohit and the robbery of Eleanor Evans, to cover the various outstanding charges. Suggs decided to plead guilty to those two charges (Tucker: St.Tr. 129-130, 131-133).

Before accepting Suggs' guilty pleas, Justice Nunez conducted an extensive examination of Suggs. In response to detailed questioning, Suggs related his family and school history, including such particulars as the name of the hospital where he was born and a description of his activities as a karate instructor (Plea Mins. 11a-13a, 18a-19a). He responded alertly and correctly when asked about his examination at the psychiatric clinic ("right downstairs") (Plea Mins. 20a). He stated that he had discussed the cases pending against him with defense counsel (Plea Mins. 14a).

In response to the court's questions, Suggs then described how he had raped Doris Mohit on May 24, 1968. He approached her after dark "coming off Amsterdam" (Plea Mins. 15a). He then forced her to go to the top floor of a building at Hamilton Avenue and 130th Street, telling her

that if she didn't go up there, "I would blow her head off" (*id.*, 15a). Asked during the plea colloquy to estimate his victim's age, Suggs said she was about 36 years old (*id.*, 17a). Asked the reason why he attacked this woman, whom he had never seen before (*id.*, 15a), Suggs said "I just had it in mind" (*id.*, 16a-17a).

Suggs then stated in response to the court's questions that a few weeks earlier, on April 24, 1968, he had approached another woman on the street, threatened her with a knife and stole her purse (Plea Mins. 17a). Suggs estimated this woman's age to be 39 or 40 years old (*id.*, 17a). Asked why he did this, Suggs replied "I just wanted to steal it" (*id.*, 18a).

In the course of the colloquy, the court asked Suggs whether he was sorry for his acts. Suggs replied that he was not sorry for these crimes (Plea Mins. 15a-16a, 21a-22a, 23a), or for anything "no matter what I do" (Plea Mins. 22a). He acknowledged that he knew that what he was doing was illegal and immoral (Plea Mins. 22a). Suggs also stated that his sister had once been raped (Plea Mins. 15a-16a), and that he had once tried to show that he was sorry when he had a childhood fight with his sister, but he was punished by his mother who "cut me," causing him to lose part of a finger (Plea Mins. 23a-24a).

Justice Nunez accepted Suggs' pleas of guilty to Rape in the First Degree and Robbery in the First Degree (Plea Mins. 22a). Then, Justice Nunez set a date for sentencing and requested a psychiatric report.

The Court: Set it down for investigation and sentence October 31st. I want a complete psychiatric

examination and report on this boy. And for that purpose I wish to commit him on my motion to Bellevue Hospital for examination and report.

Mr. Tucker, do you feel that in view of what this boy has stated here today that an examination is in order?

Mr. Tucker: I think it would be in order, Your Honor, to help Your Honor and the court determine the sentence of this defendant. I would recommend that, judge.

The Court: All right, committed to Bellevue Hospital for examination and report, psychiatric examination and investigation, and sentence 10-31, October 31, 1968.

We are going to have the doctors look at you, Mr. Suggs. They may be able to help you in some way because there is something wrong with you, apparently. You seem to be—whom are you mad at?

The Defendant: No one.

The Court: All right, see you on the 31st. Try to cooperate with the doctors. See if they can help you. (Plea Mins. 24a-25a).

As indicated by this colloquy, Suggs was sent to Bellevue in order to obtain a psychiatric report prior to sentencing.* The court's docket entries recorded that Suggs was remanded to Bellevue Hospital for psychiatric examination and report "in aid of sentencing."** Thus, Suggs' commitment to Bellevue following his plea was not an indication that the judge, the defense attorney or the prosecutor thought that Suggs was incompetent. To the contrary, they

* There was no psychiatric report in the court file (Plea Mins. 20a-21a).

** A copy of these court entries is annexed as the second page in the exhibits accompanying Suggs' "Motion to Remove Action from Suspense Calendar," etc., dated April 19, 1974 (Document No. 33 in the Record on Appeal).

clearly considered him competent or they would not have permitted his guilty plea to be entered.

The Psychiatric Examination After the Plea

On September 19, 1968, Suggs was interviewed by Dr. Martin Lubin at the Bellevue Hospital prison ward. At that time, Dr. Lubin's tentative diagnosis was, like Dr. Messenger's diagnosis in July, that Suggs had a personality disorder, which Dr. Lubin termed "schizoid with paranoid features" (Suggs' Exh. C, p. 4).*

On October 21, 1968, Dr. Lubin interviewed Suggs again, this time "jointly" with Dr. Laszlo Kadar (Lubin: St.Tr. 52, 63; Kadar: St.Tr. 11, 20, 27).** Both doctors signed a report of that date which stated that Suggs had "schizophrenia, paranoid type." The report concluded, following the language of the statute then in effect (N.Y. Code of Criminal Procedure Sec. 658), that Suggs was "in

*"Schizoid personality" is not a type of psychosis but is a personality disorder and commonly involves no "loss of capacity to recognize reality." "Diagnostic and Statistical Manual of Mental Disorders," published by American Psychiatric Association (2d ed. 1968), pp. 41, 42 (compare pp. 33, 34). See also *United States ex rel. Kaye v. Zelker*, 355 F. Supp. 1002, 1007 (S.D.N.Y. 1972), *aff'd*, 474 F.2d 1336 (2d Cir. 1973) (defendant diagnosed as "Without Psychosis: Markedly Schizoid Personality with Sexual Deviation," and found to be competent).

**Dr. Kadar rarely examined criminal defendants, but because the prison ward at Bellevue was overloaded, he was asked to help Dr. Lubin (Kadar: St.Tr. 9, 26-27; Lubin: St.Tr. 81-82). Dr. Kadar signed the October 21 report on the basis of the "joint" interview with Dr. Lubin, who was in charge of the prison ward (Kadar: St.Tr. 10). Dr. Kadar did not meet Suggs before or after the October 21 interview (Kadar: St.Tr. 11, 20, 27), and made no reference to information in Suggs' Bellevue hospital records (Kadar: St.Tr. 11-13, 33).

such a state of insanity as to be incapable of understanding the charge, proceeding or making his defense.”*

On November 6, 1968, the Lubin-Kadar report came before the state Supreme Court (Gold, J.). Upon motion of Suggs' counsel and upon consent, an order was entered committing Suggs as incompetent. No hearing was held.** Suggs was sent to Matteawan State Hospital.

The Sentencing

In April 1969, Suggs was certified as competent by authorities at Matteawan State Hospital, and was returned to the state Supreme Court for sentencing.† Instead of being represented by an attorney from the Legal Aid Society, as at his guilty pleas, Suggs was represented by an attorney assigned by the Appellate Division, First Department (see Sentencing Mins. 27a).

Another psychiatric examination was requested. Suggs was examined a second time by Dr. Messenger who found him to be competent, again diagnosing him as a “socio-

* The report of October 21, 1968 is included in Suggs' Exh. C, at pp. 18-19. A legible re-typed copy of this report is annexed as Exh. F to petitioner's “Motion to Remove Action from Suspense Calendar,” etc., dated April 19, 1974 (Document No. 33 in the record on appeal).

** The statement in the District Court's opinion of February 25, 1975, that there was a hearing on this occasion (39a), is incorrect. In the order committing Suggs (marked as Exh. “I” in the federal hearing), the words “a hearing having been duly held” were deleted. The minutes of the proceeding (marked as Exh. H in the federal hearing, and reproduced in the Joint Appendix at 132a-136a), also show that no hearing was held.

† See Exh. H to Petitioner's papers filed in the District Court in support of his “Motion to Remove Action from Suspense Calendar, etc., dated April 19, 1974 (Document Number 33 in the Record on Appeal).

pathic personality" (Report of May 20, 1969, Peo. Exh. 2; Messenger: St.Tr. 107-108).

Suggs' counsel then obtained an adjournment of the sentencing in order to move to withdraw his guilty plea (Sentencing Mins., 27a-28a). However, Suggs then changed his mind about moving to withdraw his plea. Through his counsel, he informed the court (Schweitzer, J.) that he wanted to abandon such a motion and to accept sentence on his previous guilty plea. See Sentencing Mins. 29a.

On the day of sentencing, June 6, 1969, Suggs informed the court that he believed he was incompetent at the time he pleaded guilty (Sentencing Mins. 27a).^{*} However, although the court gave Suggs another opportunity to withdraw his guilty pleas, Suggs personally informed the court that he did not desire to do so. He stated, "I wish to be sentenced today" (*id.*, 29a). In response to the court's question, Suggs personally assured the court that he no longer planned to withdraw his guilty plea (*id.*, 29a). Suggs' counsel then made a plea for leniency.

The court imposed sentence of five to fifteen years' imprisonment on each of the two counts, the sentences to run concurrently (Sentencing Mins. 32a).

Suggs then appealed, contending that the sentencing court should have *sua sponte* ordered a hearing into his

^{*} While the sentencing minutes indicate that July 3, 1969 was the sentencing date, the District Attorney's brief to the Appellate Division on appeal from the conviction states that that date is incorrect and that the sentencing actually occurred on June 6, 1969. The date of June 6, 1969 has been accepted as correct in the prior proceedings herein.

competency at the time of sentencing.* The judgment of conviction was affirmed without opinion on October 13, 1970. *People v. Suggs*, 35 A.D. 2d 781 (1st Dept. 1970). Leave to appeal to the New York Court of Appeals was denied on November 6, 1970.

**The Initiation of a Federal Habeas Proceeding in 1972,
and the Denial of a State Postconviction Motion**

In the present proceeding, commenced *pro se* on October 13, 1972, Suggs initially claimed, as in the state courts, that the sentencing court should have *sua sponte* ordered a hearing into his competency at sentencing. After Suggs' present counsel was assigned on June 5, 1973, consideration of the case by the District Court was suspended, by stipulation, so that Suggs could present to the state courts a new contention that the sentencing court did not conduct an inquiry on voluntariness claimed to be required by *Boykin v. Alabama*, 395 U.S. 238, decided June 2, 1969, four days before Suggs was sentenced.

Thereafter, Suggs presented this new claim in a motion to vacate judgment in state Supreme Court. On December 6, 1973, the state Supreme Court (Sandifer, J.), denied this motion. In its opinion, the court reasoned that a fair reading of the sentencing minutes showed that:

the court had afforded defendant's counsel an opportunity to familiarize himself with his client's desire to withdraw his previously entered guilty pleas, and that the defendant at a time when his competency ha[d] been attested to by qualified psychiatrists * * * categorically indicated that he "wanted to accept the sen-

* The same claim was made in a post-conviction application in state Supreme Court, which was denied on August 18, 1970. No appeal was taken.

tence in this case" * * * ; and in addition * * * that the defendant was afforded the opportunity to *withdraw* his previously entered pleas and not merely "to move to set (them) aside * * * (emphasis in original)."

Justice Sandifer also noted, with respect to the plea minutes of September 13, 1963, that:

While Judge Nunez apparently felt that defendant needed help [i.e., psychiatric help] * * * he apparently did not question the defendant's sanity at this time nor does the record disclose that his attorney raised this issue* * * * (Opinion, p. 2).

Leave to appeal Justice Sandifer's decision to the Appellate Division, First Department was denied on March 5, 1974. The federal habeas proceeding was removed from the suspense calendar on April 30, 1974.

The District Court's Prior Issuance of the Writ

In an opinion dated February 25, 1975, the District Court, unaware of the Messenger report of July 1968, granted habeas relief without holding a hearing. The District Court ruled that Suggs' incompetency at the time of his plea was conclusively established by the Lubin-Kadar report of October 21, 1968, which concluded that Suggs was incompetent, by the state court's subsequent commitment of Suggs as incompetent, and by Suggs' responses during the plea colloquy itself (41a-43a), which the District Court termed "bizarre" (38a, 43a, and 51a-52a).

Having concluded that Suggs was incompetent when he pleaded guilty, the District Court, relying on *Boykin v.*

* A copy of this opinion is annexed as Exhibit "I" to Suggs' "Motion to Remove Action from the Suspense Calendar," etc., dated April 19, 1974 (Document No. 33 in the Record on Appeal).

Alabama, 395 U.S. 238 (1969), ruled that the record of the sentencing was insufficient to show the voluntariness of Suggs' decision to be sentenced on his prior plea of guilty.*

The Discovery of Dr. Messenger's Reports and the Remand for an Evidentiary Hearing

During the State's appeal from the initial decision by the District Court granting the writ, the reports of Dr. Messenger's examination of Suggs in July 1968 and May 1969 were discovered in the psychiatric clinic's archives and brought⁺ to the attention of this Court.** "With the benefit of the hindsight that the district court did not have" (54a), this Court remanded the case for an evidentiary hearing on the issue of Suggs' competency at plea.

We believe that the report dated July 23, 1968 may well be of critical importance to the determination of Suggs' competence at the time of his pleas. In reporting that Suggs was not psychotic it flatly contradicts the Lubin-Kedar (*sic*) report of October 21, 1968 made three months later. The two reports raise an issue of fact as to Suggs' competence when he pleaded guilty on September 13, 1968 (59a).

Whether the evidentiary hearing was to be held by the state court or by the District Court was left to the discretion of the District Court. The District Court was supposed to balance the policy of exhausting available state remedies with the policy of not exhausting state prisoners who seek

* The District Court also rejected Suggs' claim, advanced in his initial, *pro se*, application, that the sentencing judge was required to hold a hearing *sua sponte* on Suggs' competency at sentencing (49a-50a).

** See Stipulation re testimony of Assistant Attorney General Speigel at St.Tr. 190-192.

to assert their federal constitutional rights.* This Court's opinion concluded:

In any event, we suggest that whichever court holds the evidentiary hearing should consider the advisability of taking testimony not only from the psychiatrists who examined Suggs but also from others who observed him during the critical period, including his lawyer at that time and the assistant district attorney who handled the case (60a).**

On September 2, 1975, in a memorandum opinion, the District Court requested the state court to hold the evidentiary hearing ordered by this Court. In addition to the witnesses suggested by this Court, the District Court itself suggested witnesses to be called at the hearing (state court judges and Assistants Attorney General). The District Court added, "of course, the parties may wish to call other witnesses (64a). The District Court urged the parties to present all available evidence to the state court, stating that it would be "a travesty" if material facts were omitted and that "it is heart-sickening for all courts to be faced with 'newly discovered evidence' after a full and fair hearing, particularly where the evidence apparently could have been obtained before the hearing" (63a and n.).

* It was not clear from the record on the prior appeal whether the claim that Suggs was incompetent at the time of his guilty plea (as distinguished from his claim of the right to a *sua sponte* competency hearing at sentencing) had been presented to the state courts. See 59a.

** This Court did not consider on that appeal either the District Court's ruling that the sentencing court had not sufficiently inquired into the voluntariness of Suggs' pleas to comply with *Boykin v. Alabama, supra*, or the District Court's rejection of the State's contention that Suggs had ratified his earlier plea by refusing to withdraw it when given the opportunity to do so by the sentencing court. This Court also did not reach Suggs' claim, rejected by the District Court and not pressed on that appeal, that the sentencing court should have held a competency hearing *sua sponte* at sentencing (58a, n.1).

The State Evidentiary Hearing

Pursuant to the decisions of this Court and the District Court, the parties litigated the issue of Suggs' competency at an evidentiary hearing held in state Supreme Court, New York County (MELIA, J.), on November 17 and December 1, 1975.

Suggs' Case

At this hearing, Suggs called Dr. **Martin Lubin**, and Dr. **Laszlo Kadar**, the signers of the report which said that Suggs was incompetent on October 21, 1968. Neither of these two psychiatrists stated, however, either in their report of October 21, 1968 or in their testimony at the state hearing, that they believed that Suggs was incompetent when he pleaded guilty on September 13, 1968. To the contrary, Dr. Kadar testified that Suggs was the type of person whose mental conditions may have fluctuated, being incompetent when Drs. Kadar and Lubin saw him on October 21, 1968, and being competent earlier (Kadar: St.Tr. 18, 20-21, 23-24, 31-32).^{*} Dr. Lubin agreed. Indeed, although called by Suggs, Dr. Lubin's testimony suggested that Suggs was probably competent when he pleaded guilty on September 13, 1968, and that intervening events following the plea caused deterioration or change in Suggs' condition to what Dr. Lubin believed to be a state of incompetency on October 21, 1968. Dr. Lubin considered Suggs to be "somebody who is certainly really competent most of the time" (Lubin: St.Tr. 95). Asked "to state his opinion whether Suggs was competent when he pleaded guilty on September 13, 1968, Dr. Lubin replied, "I don't know,"

^{*} Dr. Kadar also testified to his limited involvement with Suggs (see above, p. 8 n. 2).

but Suggs "might well have been competent in September" (Lubin: St.Tr. 69-70).

When Dr. Lubin first interviewed Suggs on September 19, 1968, he wrote in his notes of that interview that Suggs was "schizoid with paranoid features," a type of personality disorder. This tentative diagnosis suggests that Suggs was competent at that time, and was similar to Dr. Messenger's diagnosis in July 1968 (see above, p. 8 and n. 1). Dr. Lubin himself wrote in his notes on September 19 that Suggs "could be competent with the help of vigorous defense counsel" (Suggs' Exh. C, p. 4; Lubin: St.Tr. 48-49), and testified that on September 19, 1968, "I felt that he [Suggs] might have been a borderline case of incompetency" (Lubin: St.Tr. 49).*

When Dr. Lubin examined Suggs on October 21, 1968, Suggs "did not have a full-blown psychosis" (Lubin:

* In another case, Dr. Lubin concluded that a person whom he examined and diagnosed to be "schizoid personality with paranoid features" was competent to sit as a juror in a homicide case. In that case, after conviction, a juror stated that during the taking of testimony and the jury deliberations, he had heard voices emanating from vibrations telling him that the defendant was not guilty. Dr. Lubin made the same diagnosis as in the instant case ("schizoid personality with paranoid features") and reported:

It is my considered opinion that, notwithstanding the vulnerable personality and the fact of his having experienced an hallucinatory phenomenon, he was competent to make a rational judgment on the merits of the case presented to him in the court. He comprehended the nature of the crime, the adversaries, the facts of the case and his duty as a juror. *People v. Sullivan*, Appellant's Appendix to Brief to the New York Court of Appeals, Appendix F, Mins. dated 6/29/73, pp. 5-10 (quoted in part in 48 A.D.2d 398, 403 (dissenting opinion)).

According to Dr. Lubin, on September 19, 1968, Suggs had the same type of personality disorder as that juror, but he had no hallucinations at that time or even later on when Dr. Lubin considered him to be incompetent on October 21, 1968 (Lubin: St.Tr. 69).

St.Tr. 69). In Dr. Lubin's opinion, Suggs was incompetent on October 21, 1968, because, in Dr. Lubin's view, Suggs' level of prudence and wisdom was "not as good as it could potentially be" (Lubin: St.Tr. 58-59). It appeared to Dr. Lubin on October 21 that Suggs might not be flexible in taking advice from defense counsel (Lubin: St.Tr. 55-56, 80), and might not cooperate in giving defense counsel the facts concerning the charges against him (Lubin: St.Tr. 62, 65-67, 80).*

When Dr. Lubin was asked about the statement in his report of October 21, 1968 that Suggs had accepted the advice of his Legal Aid attorney that his best chance to minimize his sentence was to plead guilty, Dr. Lubin agreed that, in contrast to what Dr. Lubin observed on October 21, 1968, Suggs was probably competent at the time he pleaded guilty:

You are talking about the man when he was considered competent, the man at trial, prior to trial considering a plea? It squares. There is no problem there.

He was evidently able to come to a conclusion at that particular point * * *

There was no problem. He was co-operating with his attorney (Lubin: Tr. 81).

Dr. Lubin suggested two reasons why Suggs' condition deteriorated between the time he pleaded guilty on September 13, 1968 and the time Dr. Lubin observed him on October 21, 1968. First, Suggs' transfer to Bellevue prison

* Dr. Lubin found that on October 21, 1968, Suggs had the ability to understand the nature of the legal process and the charges against him (Lubin: St.Tr. 58, 60). Suggs could understand the possible consequences of the legal proceedings against him, at least in a "limited sense" (Lubin: St.Tr. 58). And, depending on his desire to do so, Suggs had the ability to give a factual accounting concerning his cases (Lubin: St.Tr. 61-62).

ward, following his guilty plea, may itself have caused Suggs' "decompensation":

coming from the detention center to a place like Bellevue which was a kind of scarey (*sic*) place, but knowing that you had to go through with the business of admitting to the fact that you had done a crime, and take a criminal sentence, then finding yourself on the prison ward in Bellevue which many criminal-defendants told me was the case, that you become terribly disturbed. It is frightening. We sometimes had as many as twenty homicide-defendants in the Ward at one time and it could be scary for a young fellow. He was only 17 (Lubin: St.Tr. 79).

Second, after Suggs' transfer to the Bellevue prison ward following his guilty plea, Suggs apparently changed his mind about whether he should have pleaded guilty (Lubin: St.Tr. 85). There were indications that Suggs may have feigned incompetency when he was interviewed by Dr. Lubin on October 21, 1968 (Lubin: St.Tr. 66-67, 82-95). Dr. Lubin noted that Suggs was "prison-wise" and "could have wanted to promote the appearance of mental disorder" (Lubin: St.Tr. 90), as "part of a tactic by which to somehow evade culpability or the consequences of having to take the plea" (Lubin: St.Tr. 66).

The stipulated testimony of Justice Nunez, introduced by Suggs, was that he vaguely recalled Suggs' plea and that he ordered that Suggs be sent to Bellevue for a complete psychiatric examination "for all purposes," not just for the purpose of sentencing (Suggs' Exh. B).*

* Justice Nunez also stated that had he known of Dr. Messenger's report, which Justice Nunez termed "preliminary," at the time of the plea, he might still have ordered a more complete examination to be done at Bellevue Hospital (Suggs' Exh. B, paragraph 3).

The State's Case

Donald Tucker, the attorney who represented Suggs when he pleaded guilty, testified that after consulting with Suggs on the day the plea was entered, he was satisfied that Suggs was competent. Suggs understood the charges against him, and the nature of the legal proceedings and their consequences. Suggs admitted his guilt to Mr. Tucker and he understood what he was doing in pleading guilty. He would have been able to assist in his defense if his cases had gone to trial (Tucker: St.Tr. 131-133).

Suggs' responses during the plea colloquy were consistent with the facts he related when he consulted with Mr. Tucker. Suggs' failure to show remorse for his behavior did not lead Mr. Tucker to believe that Suggs might not be able to participate effectively in his defense (Tucker: St.Tr. 139-140).

Assistant District Attorney **John Collins**, the prosecutor at the taking of Suggs' guilty plea, testified that there was nothing during the plea colloquy that indicated to him that Suggs was incompetent. He also noted that it was not uncommon for defendants pleading guilty to express no remorse for their conduct (Collins: St.Tr. 151, 163).

Dr. **Emanuel Messenger** testified concerning his examination of Suggs in July 1968. The purpose of this examination was to determine whether Suggs needed treatment for any mental disorder or was "incompetent to participate in his trial" (Messenger: St.Tr. 101).*

* Dr. Messenger personally spoke with Suggs on July 17, 1968, for an hour to an hour and a half, made notes (Peo. Exh. 4), and

(footnote continued on next page)

Dr. Messenger found that Suggs was a "sociopathic personality," which is "considered competent according to general psychiatric denitions." Individuals with such a mental condition "have not lost contact with reality and essentially they know what they are doing" (Messenger: St.Tr. 106-107).^{*} Dr. Messenger also testified that a person with a "sociopathic personality" is not likely to have feelings of guilt and social responsibility, and thus is not likely to express remorse (Messenger: St.Tr. 118-119).

In his report of July 23, 1968, Dr. Messenger had categorized Suggs as an "emotionally unstable type with depressive and paranoid trends" (Peo. Exh. 1; Messenger: St.Tr. 106). Dr. Messenger explained what he meant by those terms:

Emotional instability means rapid mood swings but without impulsiveness, without—without a loss of contact with reality.

referred Suggs to the clinic's psychologist for a battery of psychological tests (Messenger: St.Tr. 101, 109). On July 23, 1968, Dr. Messenger wrote his report concerning Suggs' condition (Peo. Exh. 1; Messenger: St.Tr. 99-100; Harris: St.Tr. 187). Dr. Messenger's notes (Peo. Exh. 4) recorded the clinical history he took from Suggs in his interview on July 17, 1968, including references to Suggs' difficult childhood and family life, and his stays at various institutions.

^{*} "Sociopathic personality" is:

a term which describes a mental state characterized by marked antisocial tendencies, but which does not connote insanity or mental incompetency as those terms are legally defined. *United States ex rel. Curtis v. Zelker*, 466 F.2d 1092, 1094 and n.1 (2d Cir. 1972), *cert. denied*, 410 U.S. 945 (1975) (severe psychopath regarded as competent, see 466 F.2d at 1094 and n.1, 1095, 1099).

The term used in Dr. Messenger's report of July 23, 1968 was "pathologic personality group," which, Dr. Messenger explained, was an old classification which is essentially the same as what is now termed "sociopathic personality" (Messenger St.Tr. 106).

Now, I mentioned paranoid. Paranoid means a general attitude of feeling picked upon but that can also be less than a degree which we would consider having to do with loss of contact with reality and therefore psychotic.

That's why we chose the terminology, we classify them as a behavior disorder who showed feelings of paranoia.

We called him depressive because he was unhappy and we had histories of his having made some suicidal attempts in the past and that goes along with his emotional instability.

We did not think that here (*sic*) was any divorcee from reality, and, therefore, he was competent (Tr. 106-07).

Dr. Messenger also discussed the statement in report of the clinic psychologist that Suggs had refused to cooperate on most of the Rorschach test and that "such projective material as we have does not suggest a true thinking disorder nor a psychosis."* Dr. Messenger testified that Suggs was more cooperative when Dr. Messenger spoke with him. There were few questions he did not answer, and he gave a detailed history (Messenger: St.Tr. 105, 110). Dr. Messenger noted that the psychologist's report also stated that Suggs "is able to function very well when he is so inclined" (Peo. Exhs. 1, 3; Messenger: St.Tr. 105). "In other words," Dr. Messenger stated, "it was a willful type of negativism that led him not to cooperate in certain parts of the testing" (Messenger: St.Tr. 105). Accordingly, Dr. Messenger concluded that Suggs was competent (Messenger: St.Tr. 103).

* The psychologist had also written that Suggs "impresses as willful, defensive, hostile, negativistic, paranoid and antisocial. We would classify him as a narcissistic behavior disorder of extreme degree" (Peo. Exh. 1, 3; St.Tr. 105).

The Decision

In a 35 page opinion, dated December 3, 1975, state Supreme Court Justice Melia determined that Suggs was competent when he pleaded guilty (93a). The decision regarded the extensive plea colloquy as clear evidence that Suggs knew what he was doing in pleading guilty:

the minutes of plea reflect no impairment of memory. He answered questions covering many aspects of his life from birth to date of arrest and even recalled Dr. Messenger's examination some six weeks prior to plea. He recalled the crimes to which he pleaded and volunteered information in connection therewith. He demonstrated a capacity to exercise judgment. He was able to assess the ages of two of his victims. His answers were responsive, relevant, and illuminating (93a).

The court found that Suggs' decision to plead guilty showed no lack of prudence or competent judgment on his part. "[C]ompetent judgment dictate[d] the acceptance of the best offer in order to avoid convictions on multiple counts [embracing many unrelated crimes] with the added impact of the court having heard live testimony of victims" (82a).

The decision also considered it significant that Suggs was represented by an "extremely able and experienced attorney" (82a) who "found no reason, either prior to or during plea, to lead him to believe that the defendant was incompetent. However counsel did agree with Judge Nunez that an examination would be desirable as an aid in imposing sentence" (93a).

Justice Melia noted that Justice Nunez' request, after accepting Suggs' plea of guilty, for a psychiatric report prior to sentencing, "was and is a regular practice of the court. It frequently is an aid in sentence and particularly so when the defendant is a youth as was this defendant" (83a; see also 69a). Ordering a psychiatric examination did not mean that the judge believed Suggs to be incompetent at the time of the plea:

Certainly an able and experienced jurist such as Judge Nunez did not then believe the defendant to be incompetent else he would not have accepted the plea (93a).

As for Suggs' lack of remorse for his crimes, the decision quoted Dr. Messenger's uncontradicted testimony that lack of remorse is not an indication of incompetence. Rather, lack of remorse is characteristic of a "sociopathic personality," such as Suggs, in whom feelings of guilt and social responsibility are absent (91a).

Evaluating the testimony of the three psychiatrists who had testified before him, Justice Melia decided:

Dr. Messenger, a man of long experience with highly impressive credentials, gave cogent and compelling testimony as to defendant's competence in July 1968. His testimony seemed, at least to this court, to be highly credible and reliable. The testimony of Drs. Kadar and Lubin was not as impressive (92a).*

Furthermore, only limited weight could be given to the psychiatric evidence. "[A]ll three psychiatrists agree that whether the defendant was incompetent or competent in October 1968, he could very well have been competent on September 13, 1968" (92a).

* The decision quoted at length (at 84a-91a) much of the psychiatric testimony discussed above, at pp. 15-18, 19-21.

In addition to determining that Suggs was competent when he pleaded guilty, Justice Melia also concluded that the record of the plea adequately showed that the plea was knowing and voluntary (94a-95a), and that Suggs ratified his guilty plea at the sentencing. "He still opted for the imposition of sentence on the plea rather than face the possibility of consecutive sentences on multiple B felony counts" (99a). The court concluded:

It is true that no magical formula of ratification was adhered to at the time of sentence. I submit that none is needed. Due process is satisfied when reason, logic, and common sense point to the conclusion that justice, according to law, was done (99a).

The District Court's Decision to Disregard the State Court's Determination of the Issue of Competency

Although Suggs could have sought leave to appeal the state court's decision to the Appellate Division, First Department, pursuant to N.Y. CPL 450.15 (1), he did not do so. Instead, he returned to the District Court, claiming that the record of proceedings in the state courts showed as a matter of law that he was incompetent when he pleaded guilty.* In response, the State objected that Suggs had not exhausted state appellate remedies, and maintained that the state court's factual determination was amply supported by the record and, therefore, should be given great weight.**

* In the alternative, Suggs requested that an evidentiary hearing be held by the District Court, but he did not suggest that there was any evidence on the issue of competency which had not already been presented to the state court.

** The District Attorney, New York County, having represented the State at the state court hearing, appeared for the State in the subsequent federal proceedings, including this appeal.

In an opinion, dated November 16, 1976, the District Court declared that the state court should not have decided the issue of Suggs' competency at plea. The District Court stated, "I remanded the case to State court for the *mere taking of testimony* to determine whether those involved with the case had knowledge of the Messinger reports." (106a) (emphasis added; see also 102a-103a). According to the District Court, "Judge Melia's finding of Suggs' competency at the time the plea was taken and subsequent ratification of the plea at the time of sentencing went far beyond this narrow matter referred for resolution (106a). On this ground, the District Court decided that the state court's determination of the issue of competency should be disregarded. A federal hearing was ordered so that the District Court could itself decide the issue.

The alternative ground stated by the District Court in support of its decision to disregard the state court's determination was that state Supreme Court Justice Gold, who had ordered Suggs committed on November 6, 1968, was not called as a witness at the state court hearing. The District Court said that Justice Gold should have testified whether he knew about Dr. Messenger's report of his examination of Suggs in July 1968. According to the District Court, this was a "glaring omission" from the state court record so that "even if the state hearing were viewed as a 'full blown state proceeding,' * * * Suggs was still entitled to a federal evidentiary hearing because the merits of the factual dispute were not fully resolved in the state court hearing. 28 U.S.C. Sec. 2254 (a) (1)" (108a-109a).

The District Court also rejected the State's contention, based on exhaustion principles, that before returning to

the District Court Suggs should have sought to appeal Justice Melia's decision that the evidence at the state hearing showed that he was competent at plea. The District Court noted that a claim of incompetency at plea had been stated in an earlier coram nobis petition denied by the state courts in 1973 and that further delay would, in the District Court's view, unduly burden Suggs (103a-104a).^{*} "In any event," the District Court stated, "I referred the hearing to State court not out of exhaustion considerations, but rather out of respect for the convenience of the Justices in the State system, whose testimony was essential. 400 F. Supp. 1366, 1367 [64a] (S.D.N.Y. 1975). It was well within my discretion to ignore this accommodation and hold the hearing myself" (104a-105a).^{*}

The Federal Hearing

The hearing ordered by the District Court was held on January 17 and 21, 1977. It was stipulated that Justice Gold—whose absence from the state hearing the District

^{*} The District Court noted that that coram nobis petition was not part of the appellate record before this Court on the prior appeal, and that this Court had noted that it was unclear whether the issue of Suggs' competency at the time of his guilty plea had ever been presented to the state courts (104a, n.).

A portion of that coram nobis petition (decided by Justice Sandifer (see above, pp. 11-12)), is annexed as Exhibit G to Suggs' motion for "Summary Judgment," etc., dated December 24, 1975 (Document No. 9 in the record on this appeal). No evidentiary hearing was held at that time on the issue of Suggs' competency at plea; the Messenger reports had not yet been discovered.

^{*} The District Court also rejected a new claim, not presented by Suggs to Justice Melia or in any other state proceeding, that the Messenger report of July 23, 1968 was "suppressed," so that *Brady v. Maryland*, 373 U.S. 83 (1967) applied. The District Court stated, "it cannot be said that the Messenger report was so favorable to Suggs' position as to be tantamount to an exculpatory statement * * *. [I]t is [also] questionable whether the report was suppressed within the meaning of *Brady*" (105a-106a).

Court had ruled was a "glaring omission"—would, if called, testify that he had no recollection of Suggs or of any proceeding concerning Suggs (Suggs' Exh. G).

The transcript of the hearing held in the state court was marked Court Exh. Z.* The witnesses who testified at the state court hearing did not appear at the federal hearing, except for Donald Tucker, the attorney who represented Suggs at the plea. Suggs did not call Drs. Lubin or Kadar; his counsel stated that they would have nothing to add to their testimony in the state court. The State could not call Dr. Messenger because he was unavailable, having retired to Barbados (Mins., Jan. 17, 1977, p. 40).

Suggs called Mr. Tucker but did not ask about whether, at the time of the plea, Suggs had understood the charges and proceedings and had been able to assist in his defense, as Mr. Tucker had testified at the state court hearing (St.Tr. 131-133). Instead, Suggs asked Mr. Tucker about certain other matters. There was a statement in the Legal Aid file (Suggs' Exh. L), in Mr. Tucker's handwriting and signed by Suggs, in which Suggs admitted his guilt:

9/13/68

I admit I am guilty of all the charges involved in all the inditements. I committed the rapes, robberies & assaults exactly as charged. I knew what I was doing & I want to plead guilty to dispose of my cases. I am willing to throw myself on the courts mercy.

s/ John Suggs**

* The exhibits received in evidence at the state hearing were marked as Peo. Exhs. 1-5 and Suggs' Exh. A-E.

** Quoted in Minutes of January 17, 1977, p. 34. At the state court hearing, Suggs chose not to introduce the Legal Aid file

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Mr. Tucker testified that it was his impression that he took this signed statement to protect himself since Suggs had previously denied guilt to other Legal Aid attorneys, but with Mr. Tucker on September 13, 1968, Suggs demanded to plead guilty (Mins., Jan. 17, 1977 pp. 34-35).

In response to the court's questions, Suggs testified, as he had in the state court hearing, that if he interviewed a defendant who he felt was not competent, Mr. Tucker would have made a notation to that effect in the Legal Aid file and would have requested a psychiatric examination. This was the general rule at Legal Aid at the time. There was no such notation in Suggs' file, either by Mr. Tucker or by any of the several other Legal Aid attorneys who had represented Suggs. None of these attorneys requested a psychiatric examination of Suggs (*id.*, pp. 33-34, see also p. 37; see St.Tr. 196-197).

Suggs introduced corrections records (Exhs. J and K), which contained a note from Suggs to officers at the Brooklyn House of Detention, about August 1, 1968, hinting that Suggs might attempt to commit suicide.* After Suggs wrote

he introduced into evidence at the federal hearing or to question Mr. Tucker about his written acknowledgment of guilt contained in that file, although special arrangement had been made at the state court hearing for him to obtain that file. Pursuant to Suggs' request, the state court ordered the Legal Aid Society to turn over the file to Suggs' counsel, and after he had an opportunity to examine it, arrangements were made at his request to recall Mr. Tucker so that Suggs could question him about that file (see St.Tr. 135-136, 182-183, 189, 194-196).

* The note read:

Dear Mr. Officer's if you was me what will you do if you knew you was facing a life time Sentence. Plus you don't have no one visiting you or writing you what will you do. So I feel my best way out is a Easy way. I will not tell you what my easy way is but you soon find out.

this letter, Suggs was put under special observation for approximately one week. His activities were observed and recorded at half-hourly intervals. No abnormal behavior was observed. Suggs was then returned to the general prison population (See testimony of Capt. R. Lee, Mins. of Jan. 17, 1977, pp. 14-15, 17, 20-21, 25-26).

Based upon a one-hour interview with Suggs in January 1977, a few days before the federal hearing, Dr. Augustus Kinzel, a psychiatrist, was called by Suggs to render an opinion about Suggs' mental condition eight years earlier on September 13, 1968 when Suggs pleaded guilty (Mins. of Jan. 21, 1977, pp. 12, 57). At that interview, conducted solely for the purpose of furnishing a basis for Dr. Kinzel to testify at the federal hearing, Suggs told Dr. Kinzel that he had "lost his memory" for the entire year 1968 (*id.*, pp. 14-18, 64-65). Relying largely on that story, which Suggs did not take the witness stand to support, Dr. Kinzel gave his opinion that Suggs was "probably incompetent" at the time he pleaded guilty (*id.*, p. 11).*

Having formed the "impression," based on what Suggs told him at the January 1977 interview, that Suggs was probably psychotic throughout 1968, Dr. Kinzel found himself disagreeing with the unanimous findings of the three psychiatrists who examined Suggs in 1968. For example, these psychiatrists found that Suggs' mental condition may have fluctuated between July and October 1968 so that he could have been competent at some times and not competent at other times (see Mins. of Jan. 21, 1977, pp. 68-70).

* Dr. Kinzel testified that he also reviewed "various prior psychiatric reports and prior proceedings in the criminal matters relating to Suggs" (*id.*, p. 10).

Moreover, none of the three psychiatrists observed the "psychotic amnesia" (*id.*, pp. 17-18) that Dr. Kinzel had the "impression" Suggs had during 1968, based on what Suggs told Dr. Kinzel about his "loss of memory" for that period.*

As Dr. Kinzel conceded (*id.*, pp. 25-26), his view was directly contradictory to the finding by Dr. Messenger that Suggs was "without psychosis" in July 1968 when Dr. Messenger personally examined him (Dr. Messenger's report of July 23, 1968, Peo. Exh. 1).** In an effort to explain this conflict, Dr. Kinzel claimed that Dr. Messenger, who was not available to testify at the federal hearing, having retired to Barbados, did not even perform a "psychiatric

* Dr. Messenger noted that Suggs gave a detailed history of his past (Peo. Exh. 4; Messenger: St.Tr. 110). Dr. Lubin noted at his interview with Suggs on September 19, 1968 that Suggs "is certainly able to describe the details of the crime of felonious assault that he is charged with in an adequate manner" (Suggs' Exh. C, p. 4; Lubin: St.Tr. 74).

Moreover, Suggs' Matteawan records show that on March 18 and April 1, 1969, Suggs recalled that, during May and June 1968, he was arrested for assaulting a police officer (Suggs claimed the officer "kicked me in the groin and I broke his nose and ribs"), he was taken to the "26th Street Precinct," he was released on \$500 bail, and later he was placed in a lineup where he was identified by the victim of a robbery (Suggs' Exh. F, 2d and 3rd pages from the end). The Matteawan records also suggest, as had Dr. Lubin, see above, p. 18, that Suggs may have feigned incompetency when examined by Dr. Lubin on October 21, 1968 following his guilty plea (see 3rd and 5th-9th pages from the end).

** Dr. Kinzel stated that his view that Suggs was psychotic in July 1968—when Dr. Messenger found that he was not psychotic—was based on reading the report of the psychologist with whom Suggs had been uncooperative in July 1968 (Mins. of Jan. 21, 1977, pp. 26-27, 76). The psychologist's report also stated, however, that Suggs "is able to function very well when he is so inclined." Dr. Messenger testified, "it was a willful type of negativism that led him not to cooperate in certain parts of the testing," and that Suggs was more cooperative when Dr. Messenger interviewed him (see above, p. 21).

examination" of Suggs in July 1968 (Mins. of Jan. 21, 1977, pp. 28-29).*

Dr. Kinzel thus disagreed not only with Dr. Messenger but with Dr. Lubin, the principal witness called by Suggs at the state court hearing. Dr. Lubin testified there that Dr. Messenger has an excellent reputation and that Dr. Lubin, who himself examined Suggs a few months after Dr. Messenger, had no reason to question Dr. Messenger's diagnosis of July 1968:

I can see he [Dr. Messenger] weighed all these factors in his own mind and came to a conclusion about competency. I have no reason to doubt that he [did] a good job. He has an excellent reputation (Lubin: St.Tr. 72).

Dr. Kinzel also disagreed with Dr. Lubin's own tentative diagnosis after interviewing Suggs on September 19, 1968, that Suggs had a personality disorder ("schizoid with paranoid features") (Mins. of Jan. 21, 1977, pp. 78-79).**

* Dr. Kinzel gave as a basis for this view his belief that Dr. Messenger did not take a "history" from Suggs when he interviewed Suggs on July 17, 1968 (Mins. of Jan. 21, 1977, pp. 28-29). However, Dr. Messenger's notes of that interview (Peo. Exh. 4) show that he did take a history from Suggs on that date, and Dr. Messenger testified not only that he took a "detailed history" (St.Tr. 110), but also that he considered that history, including Suggs' past suicidal activity, in arriving at his diagnosis (St.Tr. 107). Dr. Kinzel also thought that when Dr. Messenger testified at the state hearing in 1975, he should have been able to recall his examination of Suggs seven years earlier if it had been a thorough examination (Mins. of Jan. 21, 1977, pp. 28-29).

** Dr. Kinzel also thought that Dr. Lubin's understanding of competency was confused because Dr. Lubin had noted on September 19, 1968 that Suggs "could be competent with the help of vigorous defense counsel" (Exh. C). In Dr. Kinzel's opinion, "vigorous defense counsel" can defend someone who is in a state of idiocy * * * in the sense of coming up with some kind of defense * * * (Mins. of Jan. 21, 1977, pp. 80-81).

**The District Court's Decision that Suggs
Was Incompetent When He Pleaded Guilty**

In its decision, entered April 6, 1977, the District Court considered the question of Suggs' competency at the time he pleaded guilty without reference to the state court's determination of that issue. The opinion stated that "for reasons detailed in my opinion of November 16, 1976, 422 F. Supp. 1042 [100a-110a], the determination of Justice Melia, before whom testimony was taken, was set aside * * * (114a).

Using the transcript and exhibits from the state hearing, and the evidence received in the federal hearing, the District Court recounted much of the evidence discussed above (114a-128a). Then, "weighing all the evidence," the District Court came to the conclusion that Suggs was incompetent when he pleaded guilty (128a). With respect to Dr. Messenger's opinion that Suggs was competent, the District Court noted that Dr. Messenger's report was prepared on July 23, 1968, some seven weeks before the pleas. In addition, the District Court considered significant what it considered to be an "acknowledgement," made in Dr. Messenger's report of May 20, 1969, that Suggs was psychotic when he was sent to Matteawan.* The District Court also considered it significant that Dr. Messenger, in testifying, had "conceded the possibility" that Suggs may have experienced a psychotic episode even in July 1968 (128a).**

* Dr. Messenger's testimony was that, in his May 20, 1969 report, he was merely referring to conclusions reached by others, and that he was not taking issue with those conclusions (St.Tr. 113-114).

** Dr. Messenger testified that he "might" not have known about "short psychotic episodes" experienced by Suggs while Suggs was not present in the court psychiatric clinic, which was an out-patient

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The District Court regarded "the only other indicia of competence" to be the testimony of Suggs' attorney at the plea, which was significant but not controlling (128a). Concerning the plea colloquy, the District Court stated that it agreed with testimony by Dr. Kinzel, who had interviewed Suggs for the purpose of testifying at the federal hearing, that Suggs' responses in the plea minutes showed a "psychotic lack of judgment" in that there was no serious awareness of the necessity for offering a defense (126a-127a).*

The District Court's opinion also stated that Suggs "was found to be incompetent by Dr. Lubin only six days after the plea," that Dr. Kadar concurred in this conclusion some four weeks later, and that "on the basis of the Lubin-Kadar report, without objection by respondent, petitioner was committed to Matteawan * * *" (129a).

The District Court vacated Suggs' guilty pleas and ordered that the writ issue within sixty days unless Suggs is permitted to replead within that time.**

facility. Dr. Messenger added, however, "I should think the proper prison people would tell us about it" (St.Tr. 122). Then, Suggs' counsel asked whether "it could be" that Suggs was having psychotic episodes "even then" which were not manifested in some kind of noticeable behavior. Dr. Messenger responded, "It could be" (St.Tr. 122).

* The District Court stated that its conclusion regarding the plea minutes was "bolstered" by Dr. Kinzel's testimony of how, according to Suggs, he lost a portion of his finger and by other indications that the finger was actually crushed and amputated rather than being "cut" by his mother as he stated in the plea colloquy (120a, 129a).

** Unbeknownst to the State, Suggs personally sent several communications to Judge Duffy after the federal hearing (Documents 17-19 in the record on appeal). In his opinion, Judge Duffy commented on these communications, as follows:

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POINT I

The District Court erred in entirely disregarding the state court's determination that Suggs was competent at the time he pleaded guilty.

This case returns to this Court after the state court and the District Court, on largely the same evidence, have made conflicting decisions concerning whether Suggs was incompetent when he pleaded guilty almost nine years ago on September 13, 1968. The District Court simply disregarded the state court's determination. According to the District Court, the state court was only supposed to take evidence to resolve certain narrow factual matters. The state court, however, acting as a court of coordinate jurisdiction, actually decided the issue in the case—Suggs' competency at the time he pleaded guilty. The District Court thought it was warranted in ignoring the state court's determination.

The state court's determination of the issue of Suggs' competency at the time he pleaded guilty was made after a full evidentiary hearing. All the witnesses suggested by this Court on the prior appeal in this case—the defense attorney and prosecutor handling the case, and the three psychiatrists who examined Suggs shortly before and after his guilty plea—appeared as witnesses at the state hear-

It appears, however, that on the basis of communications I received from petitioner following the hearing, that petitioner may be exhibiting the same symptoms which gave rise to his original commitment to Matteawan; i.e., a belief of persecution by the prison authorities and fear for his life, and periods of blackouts. It thus may be appropriate that the state court consider causing petitioner to be examined once again as to his mental competency at this time." (129a-130a)

ing. The witnesses suggested by the District Court in requesting the state court to hold a hearing—the judge at the plea, another state judge and an Assistant Attorney General—also gave testimony, stipulated to by the parties. The state court, in an extensive opinion, weighed all the evidence and determined that Suggs was competent when he pleaded guilty.

The record of the state court hearing amply supports the state court's determination, and the District Court has not said otherwise. The plea colloquy showed that Suggs understood the charges against him, that he was cooperative, and that he was able to recall and relate the details of his personal life and of his crimes. As this Court noted in its previous decision on the prior appeal:

Justice Nunez conducted an extensive voir dire examination of Suggs * * * Suggs' responses indicated that he understood the charges, that there was a factual basis for his pleas and that he was pleading voluntarily. He admitted all of the alleged facts and even volunteered information (55a).

Experienced defense counsel was fully able to communicate with Suggs at the plea and considered him cooperative and competent.* This was highly significant evidence. See *United States ex rel. Roth v. Zelker*, 455 F.2d 1105, 1108 (2d Cir.), *cert. denied*, 408 U.S. 927 (1972).**

* Suggs did not suggest a different account of his consultation with defense counsel, either through cross-examination or by himself testifying.

** See also *United States ex rel. Curti v. Zelker*, 466 F.2d 1092, 1096, n. 8 (2d Cir. 1972), *cert. denied*, 410 U.S. 945 (1975). See also *Butler v. United States*, 384 F.2d 522, 523 (8th Cir. 1967) *cert. denied*, 391 U.S. 952 (1968) (defendant who had slashed his throat

(footnote continued on next page)

Dr. Messenger, who examined Suggs shortly before his plea and found him to be competent, gave "cogent and compelling" testimony at the state court hearing in support of this finding (Decision of Justice Melia, 92a). Drs. Lubin and Kadar, who examined Suggs after his plea and regarded him as incompetent, strongly suggested in their testimony that Suggs was competent at the time of his plea. There were also serious weaknesses in Dr. Lubin's opinion that Suggs was incompetent later on October 21, 1968, as the state court's decision noted (see 84a-88a). Thus, the evidence at the hearing amply supported the state court's determination that Suggs was competent at the time of his plea.

It is axiomatic that, under principles of federalism and comity which govern federal habeas proceedings brought by state prisoners, a state court's factual determination, made after a full and fair hearing, should be given great weight. See *Townsend v. Sain*, 372 U.S. 293 (1963); *La Vallee v. Delle Rose*, 410 U.S. 690 (1973); 28 U.S.C. §2254 (d).*

Nevertheless, the District Court declared that it would decide the issue of competency itself and, in doing so, would entirely disregard the state court's determination of the issue. The principal ground stated in support of this ruling was that the District Court had never asked the state court to hold a hearing on the issue of competency. After the state hearing had been held, the District Court said that, shortly before pleading guilty, was found competent after testimony from defense counsel that they "had no difficulty in communicating with the defendant and ascertaining the facts and that the defendant was fully advised of his rights and understood them").

* The text of 28 U.S.C. Sec. 2254(d) is reproduced in the Addendum to this Brief.

when it had "requested" the state court to hold a hearing, that request had been for the "mere taking of testimony" and the making of "narrow" findings concerning knowledge of the existence of the Messenger reports (Decision of Nov. 16, 1976, 103a, 106a). According to the District Court, the state court's determination that Suggs was competent, "went far beyond this narrow matter referred for resolution" (*id.*, 106a).

On this theory, the District Court proceeded to decide the issue of Suggs' competency at plea as if the state court's decision had never been made. The District Court held a brief hearing, at which the bulk of the evidence consisted of the transcript and exhibits from the state hearing; the additional evidence was of little significance. The District Court then set forth its own view of testimony and other evidence introduced at the state as well as the federal hearings, and decided that Suggs was incompetent, completely ignoring the state court's determination of the issue.*

There are two serious defects in the District Court's reasons for disregarding the state court's determination. First, the "narrow" limits which the District Court said it had imposed on the state court were contrary to principles of federalism and comity. The state courts are courts of coordinate jurisdiction. They sit, like the federal courts, to decide issues necessary to the resolution of cases and controversies. It is improper for a federal district court to attempt to limit a state court's consideration of an issue to the mere taking of testimony or the making of certain

* The District Court's final opinion of April 5, 1977, in which it decided that Suggs was incompetent at plea, noted that the state court's determination of the issue of competency had previously been "set aside" for the reasons stated in its earlier opinion of November 16, 1976 (114a).

narrow findings to be utilized by the federal district court in its own consideration of an outstanding issue. To do so would be to transform the judicial branch of another sovereign government into a referee for the federal district court, performing assigned tasks subject to the federal court's control and direction.

The District Court was required by this Court's decision on the prior appeal either to afford the state court the opportunity to hold an evidentiary hearing on the issue of competency or to hold such a hearing itself. It would not have been a permissible alternative for the District Court to send the case to the state courts for a hearing but to attempt to preclude the state court from deciding the issue for which the hearing was called, *i.e.*, whether Suggs was incompetent when he pleaded guilty.

Second, not only would it have been improper for the District Court to attempt to impose limits on the state court's decision-making function, but the District Court did not in fact attempt to do so until *after* the state court had held a hearing and made a decision with which the District Court disagreed (Decision of Nov. 16, 1976, 105a). When the District Court, on September 2, 1975, sent the case to the state court for a hearing, the District Court's referral was in response to the opinion of this Court, which had ordered an evidentiary hearing on the issue of Suggs' competency at plea and had suggested that the state court be given an opportunity to hold this hearing and that various witnesses be called. The District Court's memorandum opinion of September 2, 1975 did not ask the state court to refrain from hearing the witnesses which this Court had suggested it hear, or from deciding the issue which this

Court had suggested it decide. Indeed, the District Court itself suggested witnesses to be called (state court judges and Assistants Attorney-General) and expressly recognized that these suggestions were not meant to be the limits of the state court's hearing. The District Court said, "of course, the parties may wish to call other witnesses" (Decision of September 2, 1975, 64a).

Moreover, the District Court's opinion admonished the parties to present all available evidence to the state court. Referring to the discovery of Dr. Messenger's reports when the case had been before this Court, the District Court stated that it would be "a travesty" if material facts were omitted and that "it is heart-sickening for all courts to be faced with 'newly discovered evidence' after a full and fair hearing, particularly where the evidence apparently could have been obtained before the hearing" (*id.*, 63a and n.).

Thus, at the time the state court conducted its hearing and decided that Suggs was competent at plea, there had been no request by the District Court that the state court not decide the issue of competency. Rather, it appeared at that time that the state court was being requested to hold a hearing on the issue of Suggs' competency at plea and to determine that issue. And, the state court so understood (Decision of Justice Melia, Dec. 3, 1975, 66a).

Furthermore, whatever unarticulated objections the District Court may have had to the state court deciding the issue of competency, the fact remains that Suggs made no objection to the state court's resolving the issue. Indeed, Suggs vigorously litigated the issue of competency at the evidentiary hearing held by the state court. His counsel argued at length to the state court "that the defendant was

incompetent at the time of his plea on September 13th" (St.Tr. 198). In support of this position, Suggs called the two psychiatrists, Drs. Lubin and Kadar, who found him incompetent after he had pleaded guilty. Joining the issue, the State called the defense attorney and the prosecutor who handled the case, and Dr. Messenger, who examined Suggs before his plea and found him competent. Sugg's counsel cross-examined these witnesses extensively.

Thus, the issue of competency was determined by the state court after it appeared from the opinions of this Court and the District Court that the case was being sent to the state court for resolution of that issue, and after Suggs submitted his case to the state court for decision on that issue. In these circumstances, the District Court was not free to disregard the fundamental principle that a state court factual determination made after a full and fair hearing and supported by the record is entitled to great weight in the federal courts.

The District Court's alternative rationale for ignoring the state court's determination is also unsound. In its decision after the state hearing had been held and the state court had decided the issue, the District Court stated, "it is clear now that it was imperative to take the testimony of Justice Gold." According to the District Court, Justice Gold's absence from the state court hearing was such a "glaring omission" that "the merit sof the factual dispute were not fully resolved in the State court hearing. 28 U.S.C. Sec. 2254 (d) (1)" (Decision of Nov. 16, 1976, 108a).

Contrary to the District Court's statement, Justice Gold was not a vital witness. Justice Gold, on the basis of the

Lubin-Kadar report and upon consent and without a hearing, signed an order on November 6, 1968, committing Suggs as incompetent (Suggs' Exh. "I"). The proceeding was very brief, being recorded in only four pages of minutes (Suggs' Exh. H; 132a-136a). It was obviously unlikely that, some seven years later, Justice Gold would be able to recall anything about Suggs which would significantly add to what appeared in those minutes.* Moreover, it was unlikely that whatever recollection Justice Gold had of the proceeding before him on November 6, 1968, would be of critical significance to the issue of Suggs' competency at the time he pleaded guilty, particularly when there was available evidence from psychiatrists who examined Suggs on October 21, 1968, two weeks earlier. In any event, Suggs had the opportunity to call Justice Gold at the state hearing and did not do so.

Thus, it was incorrect for the District Court to say that the state court hearing, which included testimony from the defense attorney, judge and prosecutor at the plea, and three psychiatrists who examined Suggs before and after the plea, and their psychiatric reports and records, did not fully resolve the issue of Suggs' competency merely because Justice Gold was not called as a witness. Moreover, whatever at the time of its November 16, 1976 decision the District Court thought Justice Gold might add, it soon became absolutely clear that Justice Gold's absence from the state hearing was utterly insignificant. At the outset

* The minutes of the proceeding on November 6, 1968, were supplied to the District Court prior to its decision on November 6, 1976. See Exh. 7 accompanying the transmittal affidavit of Assistant District Attorney Robert Seewald, sworn to April 2, 1976 (Document No. 10 in the record on appeal). In addition, the State's accompanying memorandum of law (Document No. 9 in the record on appeal), p. 41, n., pointed out that the proceeding on November 6, 1968, was not a hearing.

of the federal hearing, Justice Gold testified (by stipulation) that he had no recollection of Suggs or of any proceeding concerning Suggs (Suggs' Exh. G). Accordingly, Justice Gold's absence from the state hearing was not a proper ground for the District Court to disregard the state court's determination of the issue of Suggs' competency at plea.

Thus, the reasons given by the District Court were insufficient to warrant entirely disregarding the state court's determination, holding a hearing and deciding the issue of competency as if the state court's determination had never been made.* Rather, under fundamental principles of federalism and comity, the state court's determination that Suggs was competent at plea, made after a full and fair hearing and amply supported by the record, is entitled to great weight.

There are also eminently practical reasons in this particular case for not disturbing the state court's determination. The state court heard all the important witnesses who gave live testimony. The state court was thus in a far better position than the District Court, which had only the "cold record" of that testimony, to judge the weight to be given to the evidence. Indeed, the state court's determination that Suggs was competent depended in part on its assessment that Dr. Messenger's testimony, which the state court heard, was "cogent and compelling testimony" and seemed "highly credible and reliable,"

* The District Court also erred in not requiring Suggs to give the state appellate courts an opportunity to review the decision made by Justice Melia before permitting Suggs to return to the federal courts under exhaustion principles, state appellate review of the extensive state evidentiary hearing should have been sought before consideration of the issue by the District Court. See *Picard v. Connor*, 404 U.S. 270, 275 (1975); *United States ex rel. Cleveland v. Casseles*, 479 F.2d 15, 19-20 (2d Cir. 1973).

whereas the testimony of Drs. Lubin and Kadar was "less impressive" (92a). That evaluation, entirely understandable from a reading of the minutes, deserves considerable weight in view of the state court's first-hand observation of the testimony of these witnesses, including their responses to questioning by the court itself. See *United States ex rel. Franco v. Ternullo*, 413 F. Supp. 801 (S.D.N.Y. 1976) (Weinfeld, J.).

In contrast with the full hearing conducted by the state court, the only testimony heard by the District Court which was even arguably significant in support of Suggs' claim was the testimony of Dr. Kinzel that Suggs was "probably incompetent" on September 11, 1968. Dr. Kinzel's testimony was most unpersuasive. His opinion was based on Suggs' story that he had "lost his memory" in 1968, a story told to Dr. Kinzel at an interview conducted eight years after the event for the purpose of enabling Dr. Kinzel to testify on Suggs' behalf at the federal hearing on his competency at plea. This story, unsupported even by Suggs' own testimony, is utterly incredible in view of Suggs' excellent recollection, in 1968 and afterwards, for numerous events, including his crimes, as shown by the records made by several psychiatrists who examined him in 1968 and 1969, and also, most notably, by the plea colloquy itself. Moreover, Dr. Kinzel's opinion was fundamentally contradictory to the important findings of the three psychiatrists who had first-hand observation of Suggs in 1968, particularly the diagnosis by Dr. Messenger in July 1968 that Suggs was "without psychosis," a finding which Dr. Kinzel attempted without success to discredit at a time when Dr. Messenger was unavailable to testify in response. Thus, Dr. Kinzel's testimony hardly warrants disturbing the determination of the state court made after

hearing the psychiatrists and other witnesses who observed Suggs at or near the time of his plea.

In sum, the state court held a full and fair hearing and determined that Suggs was competent at the time he pleaded guilty. That determination is amply supported by the record and should not be disturbed.

POINT II

At sentencing in June 1969 when Suggs was competent, Suggs abandoned the claim of incompetency at plea, and therefore he should not receive federal habeas relief on that claim.

Regardless of the merits of Suggs' claim that he was incompetent at the time he pleaded guilty, Suggs should not receive federal habeas relief because he abandoned that claim in June 1969, before he was sentenced on his guilty plea. While the Supreme Court has recently limited the availability of federal habeas relief for claims not raised prior to conviction in the state courts, *see Wainwright v. Sykes*, — U.S. —, — S.Ct. —, 21 Cr.L. 3177, 3181, 3182 (June 23, 1977), Suggs' conduct calls for denial of federal habeas relief even under the less restrictive language, criticized in *Sykes*, of *Fay v. Noia*, 372 U.S. 391, 439 (1963):

If a habeas applicant, after consultation with competent counsel or otherwise, understandingly and knowingly forewent the privilege of seeking to vindicate his federal claims in the state courts, whether for strategic, tactical, or any other reasons that can fairly be described as the deliberate by-passing of state procedures, then it is open to the federal court on habeas to deny him all relief * * *.

In the spring of 1969, when Suggs was returned from Matteawan as competent and faced sentencing on his

guilty plea of September 13, 1968, Suggs considered the alternative of withdrawing his plea on the ground of incompetency. He was given every opportunity to do so. A new attorney was appointed rather than a Legal Aid attorney, who might have had a conflict of interest on a motion to withdraw a plea entered when Suggs was represented by a Legal Aid attorney. The sentencing was adjourned so that Suggs' new counsel would have time to "formalize" an application to withdraw his plea (Mins. of Sentencing, June 6, 1969, 27a-28a).

But Suggs changed his mind about withdrawing his guilty plea. Through counsel, he informed the court in advance of the adjourned sentencing date that he had abandoned his plan to withdraw his guilty plea, and that he wanted to accept sentence on the plea (*id.*, 28a).

On June 6, 1969, Suggs was arraigned for sentence on his pleas of guilty to Rape in the First Degree (Ind. No. 3063) and Robbery in the First Degree (Ind. No. 3063A). Suggs, personally as well as through counsel, informed the court that, while he believed he was incompetent when those guilty pleas were entered, he had decided that he did not want to withdraw those pleas (*id.*, 27a-29a). The court invited Suggs, "so we will have no misunderstanding either at this time or in the future" (*id.*, 29a), to take an adjournment of the sentencing in order to confer again with his attorney about withdrawing his guilty plea.*

Suggs personally declined this opportunity to adjourn his sentencing and to give further consideration to the

* This was most solicitous of Suggs' interests since Suggs had already been granted an adjournment of sentence to give him ample opportunity to move to withdraw his plea, and the sentencing had been advanced when he changed his mind about doing so (*id.*, 27a-28a, 29a).

alternative of withdrawing his plea. He stated, "I wish to be sentenced today" (*id.*, 29a). In response to the court's question, Suggs then personally assured the court that it could assume that "after conferring with [his] lawyer [Suggs] no longer planned to withdraw [his] pleas of guilty" (Sentencing Mins., 29a). Suggs then personally stated that there was no reason why judgment should not be pronounced against him on his guilty pleas to the rape and robbery charges (*id.*, 29a). His counsel made a plea for leniency and sentence was imposed.

The strategic reason for Suggs' decision not to withdraw his guilty plea in June 1969 is obvious. At that time, the crimes he was charged with were only about a year old. If he had withdrawn his guilty plea, he would have faced trial on six separate sets of crimes, including rape, sodomy and robbery of three women, robbery of two other women, and assault on a police officer. If convicted, he would have been subject to heavy punishment after the court had heard live testimony from his victims.

In these circumstances, Suggs personally decided to reject the alternative of going to trial and to take his chances on pleading for a lenient sentence on the two felony counts to which he had pleaded guilty. Since Suggs made that decision and personally assured the court, after consultation with counsel, that he had abandoned the claim of incompetency at plea, denial of federal habeas relief on that claim is called for under the principles of federalism, comity and equity which gave rise to the limitation on such relief recognized in *Fay v. Noia*, *supra*.

In this case, there are particularly good reasons why the abandonment of the claim in the state court should

make federal habeas relief unavailable. The passage of time since June 1969 has changed the nature of the relief Suggs would receive if his claim were accepted. Years later, putting Suggs on trial would be fraught with difficulty, if not impossible. In these circumstances, vacating his guilty plea would very likely lead to dismissal of all or most of the charges, not merely to the opportunity to replead or stand trial which Suggs rejected in 1969. Even if trial were possible, to require the victims of these brutal crimes to relive their experiences on the witness stand after so many years is surely a consideration of some weight where Suggs himself chose not to go to trial when the charges were still fresh.

Furthermore, for a federal habeas court to vacate a guilty plea on a claim which, years before, when the defendant was faced with sentencing on that plea solemnly assured the state court he had abandoned, would be to encourage "sand bagging" on the part of defendants and their lawyers. If federal habeas relief is available in such circumstances, defendants may take their chances on light sentencing in the state court and, if that gamble does not pay off, attack their guilty pleas in federal habeas court some years later when the chances of their being convicted after trial have decreased markedly. *Cf. Wainwright v. Sykes, supra*, 21 Cr L at 3182.

The District Court declined to view Suggs' decision at the sentencing to abandon his claim of incompetency as an obstacle to the grant of federal habeas relief. The District Court thought that it first had to decide whether the 1968 plea was a nullity by virtue of Suggs' incompetence. Having decided that issue in Suggs' favor, the District Court then decided that the 1969 sentencing minutes were inadequate to meet the requirements for a plea colloquy estab-

lished in *Boykin v. Alabama*, 395 U.S. 238 (1969) (Decision of February 25, 1975, 43a-48a).

The District Court's reliance on *Boykin* was misplaced. The question raised by the 1969 sentencing proceeding, in which Suggs' abandoned the claim of incompetence at plea, is whether a federal habeas court should even *consider* whether Suggs was incompetent at the time he pleaded guilty. That is a question of waiver and is governed not by the *Boykin* requirement for an adequate plea colloquy, but by cases concerning the availability of federal habeas relief on a claim not raised in the state court prior to conviction, see *Fay v. Noia* and *Wainwright v. Sykes*, *supra*.

Here, the 1968 plea colloquy itself clearly met constitutional requirements. As this Court noted on the prior appeal in this case, Suggs' responses during the extensive plea colloquy "indicated that he understood the charges, that there was a factual basis for his pleas and that he was pleading voluntarily" (55a).^{*} Moreover this Court has held that *Boykin*, decided on June 2, 1969, some nine months after Suggs' pleas of guilty were entered, is not retroactive. *United States ex rel. Rogers v. Adams*, 435 F.2d 1372 (2d Cir. 1970), *cert. denied*, 404 U.S. 834 (1971). Thus, Suggs' guilty plea is indisputably valid on its face.

^{*} The District Court's opinion suggested that *Boykin* might require explicit waiver by a state defendant at plea of the constitutional rights to jury trial, to confrontation of accusers, and of the privilege against self-incrimination (44a-45a). However, this Court has since decided that "a guilty plea [in a federal case] will not be invalidated simply because of the district court's failure, during its Rule 11 inquiry, to enumerate one or more of the rights waived by the defendant." *Kloner v. United States*, 535 F.2d 730, 733 (2d Cir.), *cert. denied*, — U.S. —, 97 S. Ct. 361 (1976). Compare *United States v. Journe*, 544 F.2d 633, 635 (2d Cir. 1976) (decided under the recent amendment to Rule 11). "When a guilty plea is taken by a state judge, we cannot apply to him as a matter of federal constitutional law a higher standard than we apply to a federal district judge performing the same function." *Kelleher v. Henderson*, 531 F.2d 78, 82 (2d Cir. 1976) (absence of sentencing information).

Since Suggs decided in 1969 not to withdraw his guilty plea and to abandon his claim of incompetency at plea, a federal habeas court should not even reach the issue of whether or not he was competent at plea. This Court was presented with a similar situation in *United States ex rel. Callahan v. Follette*, 418 F.2d 903 (2d Cir. 1969), *cert. denied*, 400 U.S. 840 (1970). There, this Court decided not to reach a federal habeas claim made by a state prisoner that his guilty plea was invalid because of a sentence "promise" made by defense counsel. The reason that the claim was not reached was that at sentencing, when the claim was raised orally, the judge, while denying the request to vacate the plea, granted time for a filing of a written motion by either the defendant or his retained counsel. Although the time was thereafter extended, no motion was ever made by the defendant or his counsel. This Court held:

Callahan must be held to have waived any objection to the plea by his failure to take the opportunity offered by the judge for a formal motion and determination of his request for withdrawal. 418 F.2d at 904-905.

The District Court sought to distinguish *Callahan*, stating the plea in *Callahan* was "valid on its face," and that Callahan had the burden of proof on the issue he did not raise (Decision of Feb. 25, 1975, 47a). However, Suggs' plea was also valid on its face. In both cases, the plea was subject to being set aside if certain extrinsic facts were established, incompetency in Suggs' case, the sentence "promise" in Callahan's case. Suggs, like Callahan, had the burden of raising his claim and presenting facts establishing it. See *United States ex rel. Curtis v. Zelker*, 466 F.2d 1092, 1097 (2d Cir. 1972), *cert. denied*, 410 U.S. 945 (1975); *Papalia v. United States*, 333 F.2d 620, 621 (2d Cir.), *cert. denied*, 379 U.S. 838 (1964). Suggs, like Calla-

han, did not proceed to do so although given ample opportunity by the sentencing judge.

Furthermore, here the waiver of the claim was even clearer than in *Callahan*. Suggs did not merely fail to make a formal motion to withdraw his guilty plea after the sentencing judge gave him time to do so (Sentencing Mins. 27a-28a, 29a). Represented by counsel, who had no conflict of interest problem (unlike Callahan's attorney), Suggs explicitly waived any intention to withdraw his guilty plea and asked to be sentenced on the plea. And, he did so after the sentencing judge, unlike the judge in *Callahan* who had denied the oral request to withdraw the plea, had indicated that he would *grant* a motion to vacate Suggs' plea if such a motion were made.*

In sum, Suggs should not receive federal habeas relief on a claim of incompetency he personally assured the state court he had abandoned in June 1969.

Conclusion

The order of the District Court should be reversed and petitioner's application for writ of habeas corpus should be dismissed.

Respectfully submitted,

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* As Justice Sandifer stated in denying Suggs' post-conviction motion in 1973, a fair reading of the sentencing minutes shows that:

the defendant was afforded the opportunity to *withdraw* his previously entered pleas and not merely "to move to set (them) aside." * * * (Opinion, p. 2; emphasis in original) (see above at pp. 12-13).

ADDENDUM

STATUTES

28 U.S.C. Section 2254(d):

In any proceeding instituted in a Federal court by an application for a writ of habeas corpus by a person in custody pursuant to the judgment of a State court, a determination after a hearing on the merits of a factual issue, made by a State court of competent jurisdiction in a proceeding to which the applicant for a writ and the State or an officer or agent thereof were parties, evidenced by a written finding, written opinion, or other reliable and adequate written indicia, shall be presumed to be correct, unless the applicant shall establish or it shall otherwise appear, or the respondent shall admit—

(1) that the merits of the factual dispute were not resolved in the State court hearing;

(2) that the factfinding procedure employed by the State court was not adequate to afford a full and fair hearing;

(3) that the material facts were not adequately developed at the State court hearing;

(4) that the State court lacked jurisdiction of the subject matter or over the person of the applicant in the State court proceeding;

(5) that the applicant was an indigent and the State court, in deprivation of his constitutional right, failed to appoint counsel to represent him in the State court proceeding;

Add. 2 .

Addendum

(6) that the applicant did not receive a full, fair, and adequate hearing in the State court proceeding; or

(7) that the applicant was otherwise denied due process of law in the State court proceeding;

(8) or unless that part of the record of the State court proceeding in which the determination of such factual issue was made, pertinent to a determination of the sufficiency of the evidence to support such factual determination, is produced as provided for hereinafter, and the Federal court on a consideration of such part of the record as a whole concludes that such factual determination is not fairly supported by the record:

And in an evidentiary hearing in the proceeding in the Federal court, when due proof of such factual determination has been made, unless the existence of one or more of the circumstances respectively set forth in paragraphs numbered (1) to (7), inclusive, is shown by the applicant, otherwise appears, or is admitted by the respondent, or unless the court concludes pursuant to the provisions of paragraph numbered (8) that the record in the State court proceeding, considered as a whole, does not fairly support such factual determination, the burden shall rest upon the applicant to establish by convincing evidence that the factual determination by the State court was erroneous.

Service of 2 copies of the
within Brief is hereby
admitted this 13th day of
July 1977
Signed _____

Attorney for Petitioner - Appellee

✓ **COPY RECEIVED**

JUL 13 1977

BEWES, BALLANTINE, BUSHBY, PALMER & WOOD

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